



Summary of response to comments received on April 1999 draft Shoreline Guidelines

January 13, 2000

Comment

Response

Procedural:

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| <ul style="list-style-type: none">• Ecology failed to adequately notify and involve affected parties in preparing proposed rule revisions. | <ul style="list-style-type: none">• Since Ecology began efforts to update the guidelines in 1995, we have conducted outreach statewide through focus groups, public opinion surveys, dialogue with local government officials, mailings to thousands of individuals and three broadly representative workgroups. However, we did not reach many people that would be affected by the rule, and our proposal caught some by surprise. In recent months, Ecology has intensified efforts to discuss improvements to the guidelines with the full spectrum of interest groups, legislators, local governments and individuals. |
| <ul style="list-style-type: none">• The Legislature should review the proposed guidelines before adoption to provide direction and address legislative intent. | <ul style="list-style-type: none">• Ecology released a new informal “working draft” December 17, 1999 for consideration by the Legislature and all interested parties. |

Time:

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| <ul style="list-style-type: none">• Local governments and business assert that two years is not enough time for local governments to do quality, comprehensive updates of SMPs, which require:<ul style="list-style-type: none">Conducting resource inventories;analyzing existing codes for integration opportunities;Completing a public participation process; andFollowing all required procedural steps for adoption. | <ul style="list-style-type: none">• The two-year compliance deadline is in statute, so Legislative action is required to extend the timelines. Ecology proposed legislation last session that did not pass, that would have extended the deadlines out five years. Ecology fully supports statutory changes that would result in a more realistic compliance schedule.• Ecology agrees with local governments that a two-year deadline severely limits Ecology’s ability to provide needed technical assistance in the update of local SMPs. |
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Money:

- Local governments uniformly request that Ecology not adopt a rule without full funding of SMP updates.
- Without funds to implement the guidelines, the state will create an illegal "unfunded mandate."
- Ecology believes local governments have a need for funding of SMP updates.
- Ecology has worked closely with local governments to reduce the financial burden of SMP updates. Some examples include:
 - Requiring only use of currently available technical and scientific information in preparing **shoreline inventories** (no costly new research required),
 - Allowing local governments to satisfy guidelines requirements for **integrating with GMA** by referencing adopted Critical Area Ordinances, reducing duplication and giving credit where due
 - Allowing use of existing environment designations where they satisfy new guidelines objectives.
- Ecology continues to work closely with local governments to assess the true costs of updating local SMPs.
- The Governor's budget proposal for the 2000 session includes \$3.8 million for grants and staff support to local governments for update of local SMPs.

Exceeding statutory authority:

- There is no requirement to write a rule with updated environmental standards.
- The rule is based on an unbalanced reading of the SMA: favoring environmental protection and restoration over mixed economic, environmental and shoreline public access needs.
- In 1995, the Legislature directed Ecology to "periodically review and adopt guidelines" for SMPs consistent with SMA policy. "At least once every five years the department shall conduct a review of the guidelines..." (RCW 90.58.060).
- The guidelines acknowledge there is a need to "balance" competing interests in local shoreline programs. The policy of the SMA (RCW 90.58.020) "contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life while protecting generally public rights of navigation and corollary rights incidental thereto."

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- The SMA requires protection of shorelines, not restoration and enhancement of shorelines as a condition of shoreline development. Ecology has no authority to require a "net gain in ecological functions over time." Many claim this is a clear change in policy and should only occur at the direction of the legislature.
- The SMA does not allow regulation of activities that occur outside statutorily defined shoreline management jurisdiction (which in most cases is 200 feet from the waters edge).
- The guidelines prioritize SMA over GMA, contrary to legislative direction. The draft guidelines require all local land use plans and developments to adhere to Ecology's interpretation of the SMA. The Legislature expressly noted (in ESHB 1724) the GMA serves as the "integrating framework for all other land use related laws." Hence, local shoreline plans should coordinate with GMA plans and regulations, and not the reverse.
- The proposed rule duplicates other laws and regulatory programs, including forest practice and water quality laws.
- The SMA policy recognizes there is great concern regarding the "utilization, protection, restoration, and preservation" of shoreline natural resources (RCW 90.58.020). Ecology has worked to revise the rule to clarify under what circumstances restoration should be addressed in the local planning and SMP update process, and when restoration of ecological functions can be required of new shoreline development. Revisions now clarify there is no intent to retroactively require restoration of shoreline resources associated with existing uses and activities.
- Revisions will clarify that the guidelines only apply within shoreline jurisdiction. However, the guidelines call attention to the existing statutory requirement (RCW 90.58.340) that plans and regulations for lands outside of SMA jurisdiction recognize SMA objectives.
- The proposed guidelines provide a variety of methods to satisfy integration needs within the "framework" of GMA, fully recognizing that both statutes remain in effect and must be complied with. The goals of both are compatible. In practice, local SMP's and GMA plans and regulations can and do work together.
- Proposed revisions now state that local shoreline programs can "rely on the Forest Practices Act and rules implementing the Act and the Forest and Fish Report as adequate management of commercial forest uses within shoreline jurisdiction." The revised guidelines do not place additional requirements on timber practices. Water quality provisions have been revisited to eliminate duplication. The working draft does require local programs to ensure that new development does not adversely impact shoreline ecological functions by altering stormwater quality or flow characteristics. The working draft encourages local SMPs to

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reference other ordinances as a means of satisfying new guidelines requirements and eliminating duplication.

- The SMA is not intended to implement the federal Endangered Species Act. Ecology has no authority to require SMA changes designed to meet the federal ESA.
- Single family residences (SFRs) are considered a “priority use” under the SMA, yet there are many new restrictions on this use that are inconsistent with this priority.

- Direct references in the revised guidelines to the ESA have been removed. Ecology continues to work with local governments to explore ways that the guidelines can satisfy, where compatible, local (and state) ESA requirements.
- Close examination of SMA policy (RCW 90.58.020) and case law suggests that single family residential uses are not a preferred use of the shoreline. Only those uses that “are consistent with the control of pollution and prevention of damage to the natural environment, or which are unique to or dependent upon use of the state’s shoreline” are preferred uses. The same section further states that “alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences and their appurtenant structures...” New single family residences are recognized in the revised rule as a “priority” use when consistent with control of pollution and prevention of damage to the natural environment. Guidelines provisions will not apply to existing residences retroactively.

Salmon recovery:

- Ecology is jumping the gun on salmon recovery. There is little consensus on how to achieve salmon recovery. Without a coordinated state and federal plan, local governments must conduct a difficult and expensive planning process with no assurance that the results will be sufficient to address the issues raised by ESA.
- The state is trying to solve the wrong problem - overfishing, predatory terns, ocean weather conditions, and dams are major causes of salmon decline, so Ecology’s effort to stop cumulative habitat loss is misplaced.

- Update of the guidelines are recognized in the state salmon recovery strategy as a significant tool for ESA response, particularly in the area of habitat. Ecology continues to work with federal agencies and local governments to coordinate shoreline salmon recovery efforts in a manner that satisfies multiple objectives; not only SMA (and GMA) requirements, but also ESA objectives.
- Scientific evidence shows that loss of shoreline habitat is at least a partial cause of salmon decline. The guidelines represent just one part of the larger effort to respond to declining salmon populations.

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- Pollution from cities is causing declines in fish, water is cleanest in rural areas, yet rural areas have to sacrifice the most with wide buffer requirements, while cities are not held to the same standards.

Vegetation buffers and setbacks:

- Proposed vegetative buffer standards will severely limit or curtail already hard hit existing and on-going agricultural activities.
- The “site potential tree height” (SPTH) vegetation provisions, applied uniformly, lack scientific justification (e.g., urban Puget Sound shorelines, forested streams, and Eastern Washington lakes are not the same).
- Vegetation provisions (buffers) required by the proposed guidelines will cause unconstitutional “taking” of private property by requiring such restrictive buffers that new and continued economic uses are effectively prohibited in shoreline areas. Ecology has ignored the SMA policy “to protect private property rights while implementing the policies of the Act.”

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- Ecology has been working closely with stakeholders representing agricultural and rural interests to ensure they receive equitable treatment in the updated rule.
- Revisions to the rule clarify that the new guidelines will not apply to existing and ongoing agricultural activities, nor to agricultural lands enrolled in set-aside programs. The new Agriculture/Fish/Water negotiations will address such issues.
- Ecology agrees that SPTH provisions applied uniformly statewide aren't workable. The working draft allows use of alternative approaches especially in grassland environments (*e.g. eastern Washington*). The new draft eliminates the "vegetation management corridor" overlay applied to all shorelines based on SPTH. Local governments will instead be required to demonstrate protection of shoreline ecological functions and natural shoreline processes within SMA jurisdiction, as the basis for setting appropriate vegetation buffers. Protecting shoreline vegetation is critical to sustaining viable nearshore habitat. Ecology will present, in a new DEIS for the revised rule, the scientific basis for the new vegetation provisions.
- Creating a “taking” presumes no reasonable use of the land remains. The State Attorney Generals Office has reviewed the proposed rule to ensure that no taking occurs. Additional specific references to protection of private property rights have been added to the new draft guidelines.

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Bulkheads:

- Provisions on bulkheads will significantly increase the complexity of shoreline applications and review time. The rule has the opposite effect of 1992 SMA amendments which call for "effective and timely protection against loss or damage to single family residences due to shoreline erosion."
- Replacement of existing bulkheads should be simple and expedited, with no requirement to hire a consultant to demonstrate need.
- The working draft specifically references the 1992 changes in the act. Given what science tells us about the impact bulkheads can have on shoreline processes and habitat, the guidelines continue to limit the spread of shoreline armoring. The working draft recognizes there are legitimate stabilization needs for water dependent and shoreline preferred uses. Guidelines would not be retroactive to existing structures, including residences. The working draft clarifies that ongoing repair and maintenance of existing bulkheads is allowed.
- The working draft clarifies that replacement of existing bulkhead structures is allowed where there is a demonstrated need, and the structure is designed and constructed to minimize harm to the natural shoreline environment. New provisions allow replacement structures to encroach waterward of the existing structure only where the protected residence was occupied prior to January 1992.

Piers and docks:

- Waterfront residents object to the prohibition of new piers and docks "unless the applicant has demonstrated that a specific need exists to support the intended use."
- Waterfront residents also object to the requirement that they show a "nearby pier, dock or mooring buoy" cannot support the intended use.
- Ecology has not shown evidence that new docks and piers will necessarily adversely impact the environment or prevent the recovery of endangered fish.
- Some jurisdictions currently require this now. The working draft does not require demonstration of need for new single-family residential docks. However, all docks would be restricted to the minimum size necessary and must be constructed to avoid, minimize and mitigate impacts to shoreline functions and processes.
- Ecology deleted the requirement that residents show a nearby dock is unavailable. Proliferation of docks can impact navigation and fish migration, so the working draft encourages (but doesn't require) local shoreline programs to encourage "joint use" or "community dock" facilities over individual single family residential docks.
- Ecology is preparing a new DEIS for the revised rule that will need to document the evidence that new docks and piers adversely impact the shoreline environment.

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Best available science:

- The draft rule requires local government to use "Best Available Science," which is not required under the SMA, only under the Growth Management Act (GMA). This could require expensive new original research; result in unproductive conflicts between dueling scientists; and cut out citizen participation in local decision-making.

Provisions specifically requiring use of BAS have been removed, except where required by the GMA for critical areas. Proposed revisions now directly refer to the existing statutory requirement [RCW 90.58.100(1)] for use of scientific information in the update of SMPs, recognizing that scientific information is important, but not the only source of valuable information or basis for decision-making. Local citizen expertise and knowledge of the shorelines must be acknowledged in the process.

Guidance has also been provided for dealing with conflicting science. The guidelines, particularly in the area of inventory requirements (*see below*) will be revised to clarify that new and original research will not be required in updating local SMPs. At a minimum however, a deliberate exercise in seeking out and identifying all existing information will still be required.

Inventory:

- Local governments uniformly assert that shoreline inventory requirements are beyond their capabilities and lack clear minimum requirements. Some believe the state should conduct the inventories, on a watershed basis.
- Ecology has worked with local government officials to address this issue. Inventory provisions have been revised to clearly define what the minimum inventory requirements are and define an acceptable methodology for using scientific and technical information in the SMP update process.
- Many object to the provision that in the absence of inventory information, "the less known about existing resources, the more stringent provisions need to be to ensure protection."
- The "in the absence of information" issue is a generally applied objective designed to provide protection until more is known, and avoid irreparable damage to the shoreline environment. Consistent with SMA policy to "protect" shoreline resources, this provision remains unchanged. Site-specific inventory required at the time a project is proposed is identified as an acceptable alternative.

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Adaptive Management:

Requiring adoption of adaptive management provisions would require costly inventory, ongoing monitoring, and periodic revisions based on unclear standards with no basis in the SMA for the requirement

- Specific adaptive management requirements have been removed from the working draft. Resolving this issue, especially when lacking sufficient funding, is beyond the scope of this rule update process. Revised language encourages local gov'ts "to undertake local monitoring and periodically update SMP provisions to improve shoreline management practices over time."

Rule is unclear:

- The guidelines are too complex and too ambiguous to serve as a useful guide for local governments in developing revisions to local SMPs.
- Ecology has made significant text revisions and reorganized the rule to simplify guidelines provisions, recognizing that policies not understood will not be effectively implemented.
- The guidelines will continue to use a performance-based approach to establishing statewide guidance in shoreline management. The alternative is a more prescriptive and even more complex rule.

Additional environmental community comments:

- The update is long overdue, Ecology should not delay. Ecology should stand up to economic development pressures. The rule places needed restrictions on bulkheads to help salmon recovery.
- Comments noted.
- Too much reliance on mitigation, and not enough on protection of existing natural resources, particularly with regard to wetlands.
- The wetlands provisions in particular, have been fully overhauled to include avoidance (protection) as the first priority to mitigation.
- Specific (prescriptive) minimum standards are needed to be effective. Performance-based standards are too difficult to enforce.
- Given the diverse set of environments being managed statewide (e.g. marine shorelines, estuaries, rivers, lakes, rural areas, large urbanized waterfronts, etc.), Ecology is doing the best it can to make the rules straight-forward and clear.
- Lower environmental standards are allowed for urban areas. Areas within urban growth boundaries are at greatest risk from degradation, need better protection.
- Revisions have been made that better address urban settings, particularly with regard to vegetation conservation requirements in already developed areas.

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- A reliable monitoring system and good baseline inventory protocols are needed.
 - Ecology should adopt interim measures such as “no-touch buffers” to assure habitat is protected until local shoreline master programs are updated.
- A reliable monitoring system and detailed baseline inventory protocols are beyond the scope of the current effort. Coordination with other state agencies and their efforts (e.g. DNR’s GIS Framework project) will continue. The working draft more clearly defines minimum inventory standards required during update of SMPs.
 - Adopting interim measures is not currently within the scope of this effort.